STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRANCE MARIO PERKINS,

Defendant-Appellant.

UNPUBLISHED
September 25, 2007

No. 269787
Wayne Circuit Court
LC No. 05-011641-01

Before: Schuette, P.J., and Hoekstra and Meter, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions following a bench trial of assault with intent to do great bodily harm less than murder, MCL 750.84, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to three to 10 years in prison for the assault conviction and to a consecutive two-year term for the felony-firearm conviction. We affirm.

Defendant argues that there was insufficient evidence to allow the trial court to convict him of assault with intent to do great bodily harm less than murder. He contests the sufficiency of the evidence in general and also argues, more specifically, that the prosecutor presented insufficient evidence of specific intent.

We review de novo a challenge to the sufficiency of the evidence in a bench trial. *People v Lanzo Construction Co*, 272 Mich App 470, 473; 726 NW2d 746 (2006). "In reviewing a challenge to the sufficiency of the evidence, this Court analyzes the evidence presented in the light most favorable to the prosecution to determine whether any rational trier of fact could have found that the essential elements of the crime charged were proven beyond a reasonable doubt." *People v Lundy*, 467 Mich 254, 257; 650 NW2d 332 (2002).

"The elements of assault with intent to do great bodily harm less than murder are: (1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder." *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005) (emphasis removed); see also MCL 750.84. Assault with intent to do great bodily harm is a specific intent crime. *Brown, supra* at 147. "An intent to harm the victim can be inferred from defendant's conduct." *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). Additionally, "[o]nce evidence of self-defense is introduced, the prosecutor bears the burden of disproving it beyond a reasonable doubt." *People v James*, 267 Mich App 675,

677; 705 NW2d 724 (2005) (internal citation and quotation marks omitted). Self-defense is applicable "if the defendant honestly and reasonably believes that his life is in imminent danger or that there is a threat of serious bodily harm." *People v Kurr*, 253 Mich App 317, 320-321; 654 NW2d 651 (2002) (internal citation and quotation marks omitted).

We reject defendant's claims of insufficient evidence. Both an out-of court statement of the victim's girlfriend, an eyewitness to the shooting, and the trial testimony of the only defense witness established that defendant shot the victim, defendant's brother, while they were arguing on a family member's front porch. Moreover, defendant's specific intent to do great bodily harm could be inferred from defendant's having shot the victim at very close range. See *Parcha*, *supra* at 239 (inferring intent to harm the victim from the defendant's conduct where the defendant shot the victim twice at close range with a fully loaded pistol and finding sufficient evidence to convict the defendant). The victim was shot once in the left shoulder and once in the abdomen. There were both entrance and exit wounds from the shot to the abdomen. The victim sustained serious internal injuries, including injuries to his small bowel, colon, and left kidney. One of his vertebrae was also fractured. The record makes clear that the prosecutor presented sufficient evidence of defendant's intent.

There was also sufficient evidence for a rational trier of fact to conclude beyond a reasonable doubt that defendant was not acting in self-defense when he shot the victim. The only evidence of self-defense came from the sole defense witness, who testified that the victim had a gun and threatened to shoot defendant just before defendant fired the first shot. The trial court's conclusion that defendant did not act in self-defense was based on its disbelief of the defense witness's testimony about the victim's having had a gun.[1] Credibility determinations are for the trier of fact. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). The court, in stating that it disbelieved the witnesses's testimony that the victim had a gun, focused heavily on defendant's prison telephone conversations, which apparently contained no mention of the victim's having had a gun. The court also noted that defendant told a false story to the police about a drive-by shooting instead of informing them that he had acted in self-defense. Under all the circumstances, and keeping in mind the significant tenet that credibility determinations are for the trier of fact to make, there was sufficient evidence for the trial court to conclude that defendant did not shoot the victim in self-defense.

Defendant next argues that the admission of the out-of-court statements of the victim's girlfriend violated defendant's Sixth Amendment right to confront the witnesses against him, even if the statements were otherwise admissible as excited utterances under the Michigan Rules of Evidence. We disagree.

"To preserve an evidentiary issue for review, a party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal." *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001); MRE 103(a)(1). "Because the grounds for objection at trial and the grounds raised on appeal must be the same, an objection based on

[1] Contrary to defendant's implication, the court did not act inappropriately in finding some, but not all, of the witness's testimony credible.

the rules of evidence will not necessarily preserve for appeal a Confrontation Clause objection." *People v Bauder*, 269 Mich App 174, 177-178; 712 NW2d 506 (2005). Because defendant did not object to the admission of the out-of-court statements on Confrontation Clause grounds, this issue is unpreserved. Therefore, we review this claim for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *Bauder*, *supra* at 180. "[T]o avoid forfeiture of the issue, defendant must demonstrate plain error that affected his substantial rights, i.e., that affected the outcome of the proceedings." *Aldrich*, *supra* at 110. "We will reverse only if we determine that, although defendant was actually innocent, the plain error caused him to be convicted, or if the error seriously affected the fairness, integrity, or public reputation of judicial proceedings, regardless of his innocence." *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004) (internal citation and quotation marks omitted).

In *Crawford v Washington*, 541 US 36, 53-54; 124 S Ct 1354; 158 L Ed 2d 177 (2004), the Supreme Court held that the Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination." The Court made clear that the Clause applies to out-of-court statements, regardless of whether those statements are admissible under the rules of evidence. *Id*. at 50-51. Because only testimonial statements "cause a declarant to be a 'witness' within the meaning of the Confrontation Clause," *Davis v Washington*, ___ US ___;126 S Ct 2266, 2273; 165 L Ed 2d 224 (2006), the key question here is whether the declarant's statements were testimonial.

Without purporting to offer a complete definition of testimonial statements, the Supreme Court in *Davis* offered the following distinction:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. [*Id*. at 2273-2274.]

The Court also noted, however, that it was only framing the issue in terms of interrogation because of the nature of the cases before it. *Id*. at 2274 n 1. It made clear that even "volunteered testimony or answers to open-ended questions" may be testimonial. *Id*. Moreover, "even when interrogation exists, it is in the final analysis the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate." *Id*.

In this case, the statements the declarant made immediately upon her arrival at the hospital were clearly nontestimonial. These statements consisted mainly of repeated exclamations that defendant had shot the victim and appeals to the hospital staff to help the victim. The declarant was "hysterical" and the victim was lying in the back of the van covered with blood. The purpose of the statements was to tell the officer and hospital staff that the victim had been shot in order to ask for their assistance. Therefore, the declarant's statements were not designed to "establis[h] or prov[e] some past fact," but were made in the midst of an emergency for the purpose of obtaining help from hospital staff. *Davis*, *supra* at 2276 (internal citation and quotation marks omitted); see also *People v Jordan*, ___ Mich App ___ ; ___ NW2d ___

(Docket No. 267152, decided April 19, 2007), slip op, p 3 ("[w]e hold that questions necessary to obtaining or providing emergency medical care are nontestimonial").

The closer question is whether statements the declarant made ten minutes later were also nontestimonial. The Supreme Court has recognized that even if statements made early in a conversation between a police officer and a witness are nontestimonial, statements made later in the same conversation, once the emergency has ceased, may be testimonial. *Davis*, *supra* at 2277. In this case, although the declarant was "still hysterical" and "still screaming," her later statements were arguably more about "describ[ing] past events" than about "meet[ing] an ongoing emergency." *Davis*, *supra* at 2276-2277 (internal citation and quotation marks omitted). The declarant told the security police officer at the hospital that she and the victim had gone over to defendant's house "to confront him about taking some 'E' pills," defendant and the victim got into an argument on the front porch, and defendant shot the victim. This information went beyond that necessary to obtain medical treatment for the victim, and, because the declarant was making the statements to a police officer, she may well have been making them for the purpose of establishing past facts possibly relevant to future criminal proceedings.

However, even if these later statements were testimonial and therefore inadmissible, defendant has failed to establish that the error in admitting them affected the outcome of the trial. The trial court stated that "the People's case does not rest solely or even largely on the out-of-court statements." Given the defense witness's testimony that defendant shot the victim, combined with medical records indicating that defendant "shot [the victim] at least twice, once in the stomach and once in the upper torso," and that the victim sustained severe injuries, the key issue from the trial court's perspective was "whether or not [the victim] had a gun, or whether or not the shooting was in self-defense." The court noted that the declarant had said only that there had been a shooting, and it wondered if she would even have known whether the victim had a gun. In light of the other evidence, it found the defense witness's testimony that defendant shot the victim credible, but it did not believe his testimony that the victim had a gun. The court also concluded that if defendant had really been acting in self-defense, this information would have come out earlier in his conversations with police. Instead, defendant told police that he and his brother had been the victims of a drive-by shooting. In addition, the court noted that the issue of self-defense did not figure into defendant's telephone conversations, which focused instead on preventing the victim's girlfriend from testifying. In light of all the evidence and findings, and given the trial court's indication that its reliance on the out-of-court statements was minimal, there is no indication that the outcome of the trial would likely have been different if the statements in question had been excluded. *Aldrich*, *supra* at 110. Reversal is unwarranted.

In light of our disposition, we need not address the prosecutor's argument that defendant waived his Confrontation Clause claim through wrongdoing.

Affirmed.

/s/ Bill Schuette
/s/ Joel P. Hoekstra
/s/ Patrick M. Meter